Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC (repealed)

DIRECTIVE 2004/39/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

of 21 April 2004

on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC (repealed)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 47(2) thereof,

Having regard to the proposal from the Commission[(1)],

Having regard to the Opinion of the European Economic and Social Committee[(2)],

Having regard to the opinion of the European Central Bank[(3)],

Acting in accordance with the procedure laid down in Article 251 of the Treaty[(4)],

Whereas:

(1) Council Directive 93/22/EEC of 10 May 1993 on investment services in the securities field[(5)] sought to establish the conditions under which authorised investment firms and banks could provide specified services or establish branches in other Member States on the basis of home country authorisation and supervision. To this end, that Directive aimed to harmonise the initial authorisation and operating requirements for investment firms including conduct of business rules. It also provided for the harmonisation of some conditions governing the operation of regulated markets.

(2) In recent years more investors have become active in the financial markets and are offered an even more complex wide-ranging set of services and instruments. In view of these developments the legal framework of the Community should encompass the full range of investor-oriented activities. To this end, it is necessary to provide for the degree of harmonisation needed to offer investors a high level of protection and to allow investment firms to provide services throughout the Community, being a Single Market, on the basis of home country supervision. In view of the preceding, Directive 93/22/EEC should be replaced by a new Directive.

(3) Due to the increasing dependence of investors on personal recommendations, it is appropriate to include the provision of investment advice as an investment service requiring authorisation.

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(4) It is appropriate to include in the list of financial instruments certain commodity derivatives and others which are constituted and traded in such a manner as to give rise to regulatory issues comparable to traditional financial instruments.

(5) It is necessary to establish a comprehensive regulatory regime governing the execution of transactions in financial instruments irrespective of the trading methods used to conclude those transactions so as to ensure a high quality of execution of investor transactions and to uphold the integrity and overall efficiency of the financial system. A coherent and risk-sensitive framework for regulating the main types of order-execution arrangement currently active in the European financial marketplace should be provided for. It is necessary to recognise the emergence of a new generation of organised trading systems alongside regulated markets which should be subjected to obligations designed to preserve the efficient and orderly functioning of financial markets. With a view to establishing a proportionate regulatory framework provision should be made for the inclusion of a new investment service which relates to the operation of an MTF.

(6) Definitions of regulated market and MTF should be introduced and closely aligned with each other to reflect the fact that they represent the same organised trading functionality. The definitions should exclude bilateral systems where an investment firm enters into every trade on own account and not as a riskless counterparty interposed between the buyer and seller. The term ‘system’ encompasses all those markets that are composed of a set of rules and a trading platform as well as those that only function on the basis of a set of rules. Regulated markets and MTFs are not obliged to operate a ‘technical’ system for matching orders. A market which is only composed of a set of rules that governs aspects related to membership, admission of instruments to trading, trading between members, reporting and, where applicable, transparency obligations is a regulated market or an MTF within the meaning of this Directive and the transactions concluded under those rules are considered to be concluded under the systems of a regulated market or an MTF. The term ‘buying and selling interests’ is to be understood in a broad sense and includes orders, quotes and indications of interest. The requirement that the interests be brought together in the system by means of non-discretionary rules set by the system operator means that they are brought together under the system's rules or by means of the system's protocols or internal operating procedures (including procedures embodied in computer software). The term ‘non-discretionary rules’ means that these rules leave the investment firm operating an MTF with no discretion as to how interests may interact. The definitions require that interests be brought together in such a way as to result in a contract, meaning that execution takes place under the system's rules or by means of the system's protocols or internal operating procedures.

(7) The purpose of this Directive is to cover undertakings the regular occupation or business of which is to provide investment services and/or perform investment activities on a professional basis. Its scope should not therefore cover any person with a different professional activity.

(8) Persons administering their own assets and undertakings, who do not provide investment services and/or perform investment activities other than dealing on own account unless they are market makers or they dealon own account outside a

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regulated market or an MTF on an organised, frequent and systematic basis, by providing a system accessible to third parties in order to engage in dealings with them should not be covered by the scope of this Directive.

(9) References in the text to persons should be understood as including both natural and legal persons.

(10) Insurance or assurance undertakings the activities of which are subject to appropriate monitoring by the competent prudential-supervision authorities and which are subject to Council Directive 64/225/EEC of 25 February 1964 on the abolition of restrictions on freedom of establishment and freedom to provide services in respect of reinsurance and retrocession[(6)], First Council Directive 73/239/EEC of 24 July 1973 on the coordination of laws, regulations and administrative provisions relating to the taking up and pursuit of direct insurance other than life assurance[(7)] and Council Directive 2002/83/EC of 5 November 2002 concerning life assurance[(8)] should be excluded.

(11) Persons who do not provide services for third parties but whose business consists in providing investment services solely for their parent undertakings, for their subsidiaries, or for other subsidiaries of their parent undertakings should not be covered by this Directive.

(12) Persons who provide investment services only on an incidental basis in the course of professional activity should also be excluded from the scope of this Directive, provided that activity is regulated and the relevant rules do not prohibit the provision, on an incidental basis, of investment services.

(13) Persons who provide investment services consisting exclusively in the administration of employee-participation schemes and who therefore do not provide investment services for third parties should not be covered by this Directive.

(14) It is necessary to exclude from the scope of this Directive central banks and other bodies performing similar functions as well as public bodies charged with or intervening in the management of the public debt, which concept covers the investment thereof, with the exception of bodies that are partly or wholly State-owned the role of which is commercial or linked to the acquisition of holdings.

(15) It is necessary to exclude from the scope of this Directive collective investment undertakings and pension funds whether or not coordinated at Community level, and the depositaries or managers of such undertakings, since they are subject to specific rules directly adapted to their activities.

(16) In order to benefit from the exemptions from this Directive the person concerned should comply on a continuous basis with the conditions laid down for such exemptions. In particular, if a person provides investment services or performs investment activities and is exempted from this Directive because such services or activities are ancillary to his main business, when considered on a group basis, he should no longer be covered by the exemption related to ancillary services where the provision of those services or activities ceases to be ancillary to his main business.

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(17) Persons who provide the investment services and/or perform investment activities covered by this Directive should be subject to authorisation by their home Member States in order to protect investors and the stability of the financial system.

(18) Credit institutions that are authorised under Directive 2000/12/EC of the European Parliament and of the Council of 20 March 2000 relating to the taking up and pursuit of the business of credit institutions[(9)] should not need another authorisation under this Directive in order to provide investment services or perform investment activities. When a credit institution decides to provide investment services or perform investment activities the competent authorities, before granting an authorisation, should verify that it complies with the relevant provisions of this Directive.

(19) In cases where an investment firm provides one or more investment services not covered by its authorisation, or performs one or more investment activities not covered by its authorisation, on a non-regular basis it should not need an additional authorisation under this Directive.

(20) For the purposes of this Directive, the business of the reception and transmission of orders should also include bringing together two or more investors thereby bringing about a transaction between those investors.

(21) In the context of the forthcoming revision of the Capital Adequacy framework in Basel II, Member States recognise the need to re-examine whether or not investment firms who execute client orders on a matched principal basis are to be regarded as acting as principals, and thereby be subject to additional regulatory capital requirements.

(22) The principles of mutual recognition and of home Member State supervision require that the Member States' competent authorities should not grant or should withdraw authorisation where factors such as the content of programmes of operations, the geographical distribution or the activities actually carried on indicate clearly that an investment firm has opted for the legal system of one Member State for the purpose of evading the stricter standards in force in another Member State within the territory of which it intends to carry on or does carry on the greater part of its activities. An investment firm which is a legal person should be authorised in the Member State in which it has its registered office. An investment firm which is not a legal person should be authorised in the Member State in which it has its head office. In addition, Member States should require that an investment firm's head office must always be situated in its home Member State and that it actually operates there.

(23) An investment firm authorised in its home Member State should be entitled to provide investment services or perform investment activities throughout the Community without the need to seek a separate authorisation from the competent authority in the Member State in which it wishes to provide such services or perform such activities.

(24) Since certain investment firms are exempted from certain obligations imposed by Council Directive 93/6/EEC of 15 March 1993 on the capital adequacy of investment firms and credit institutions[(10)], they should be obliged to hold either a minimum amount of capital or professional indemnity insurance or a combination of both. The adjustments of the amounts of that insurance should take into account adjustments

made in the framework of Directive 2002/92/EC of the European Parliament and of the Council of 9 December 2002 on insurance mediation[(11)]. This particular treatment for the purposes of capital adequacy should be without prejudice to any decisions regarding the appropriate treatment of these firms under future changes to Community legislation on capital adequacy.

(25) Since the scope of prudential regulation should be limited to those entities which, by virtue of running a trading book on a professional basis, represent a source of counterparty risk to other market participants, entities which deal on own account in financial instruments, including those commodity derivatives covered by this Directive, as well as those that provide investment services in commodity derivatives to the clients of their main business on an ancillary basis to their main business when considered on a group basis, provided that this main business is not the provision of investment services within the meaning of this Directive, should be excluded from the scope of this Directive.

(26) In order to protect an investor's ownership and other similar rights in respect of securities and his rights in respect of funds entrusted to a firm those rights should in particular be kept distinct from those of the firm. This principle should not, however, prevent a firm from doing business in its name but on behalf of the investor, where that is required by the very nature of the transaction and the investor is in agreement, for example stock lending.

(27) Where a client, in line with Community legislation and in particular Directive 2002/47/EC of the European Parliament and of the Council of 6 June 2002 on financial collateral arrangements[(12)], transfers full ownership of financial instruments or funds to an investment firm for the purpose of securing or otherwise covering present or future, actual or contingent or prospective obligations, such financial instruments or funds should likewise no longer be regarded as belonging to the client.

(28) The procedures for the authorisation, within the Community, of branches of investment firms authorised in third countries should continue to apply to such firms. Those branches should not enjoy the freedom to provide services under the second paragraph of Article 49 of the Treaty or the right of establishment in Member States other than those in which they are established. In view of cases where the Community is not bound by any bilateral or multilateral obligations it is appropriate to provide for a procedure intended to ensure that Community investment firms receive reciprocal treatment in the third countries concerned.

(29) The expanding range of activities that many investment firms undertake simultaneously has increased potential for conflicts of interest between those different activities and the interests of their clients. It is therefore necessary to provide for rules to ensure that such conflicts do not adversely affect the interests of their clients.

(30) A service should be considered to be provided at the initiative of a client unless the client demands it in response to a personalised communication from or on behalf of the firm to that particular client, which contains an invitation or is intended to influence the client in respect of a specific financial instrument or specific transaction. A service can be considered to be provided at the initiative of the client notwithstanding that the

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client demands it on the basis of any communication containing a promotion or offer of financial instruments made by any means that by its very nature is general and addressed to the public or a larger group or category of clients or potential clients.

(31) One of the objectives of this Directive is to protect investors. Measures to protect investors should be adapted to the particularities of each category of investors (retail, professional and counterparties).

(32) By way of derogation from the principle of home country authorisation, supervision and enforcement of obligations in respect of the operation of branches, it is appropriate for the competent authority of the host Member State to assume responsibility for enforcing certain obligations specified in this Directive in relation to business conducted through a branch within the territory where the branch is located, since that authority is closest to the branch, and is better placed to detect and intervene in respect of infringements of rules governing the operations of the branch.

(33) It is necessary to impose an effective 'best execution' obligation to ensure that investment firms execute client orders on terms that are most favourable to the client. This obligation should apply to the firm which owes contractual or agency obligations to the client.

(34) Fair competition requires that market participants and investors be able to compare the prices that trading venues (i.e. regulated markets, MTFs and intermediaries) are required to publish. To this end, it is recommended that Member States remove any obstacles which may prevent the consolidation at European level of the relevant information and its publication.

(35) When establishing the business relationship with the client the investment firm might ask the client or potential client to consent at the same time to the execution policy as well as to the possibility that his orders may be executed outside a regulated market or an MTF.

(36) Persons who provide investment services on behalf of more than one investment firm should not be considered as tied agents but as investment firms when they fall under the definition provided in this Directive, with the exception of certain persons who may be exempted.

(37) This Directive should be without prejudice to the right of tied agents to undertake activities covered by other Directives and related activities in respect of financial services or products not covered by this Directive, including on behalf of parts of the same financial group.

(38) The conditions for conducting activities outside the premises of the investment firm (door-to-door selling) should not be covered by this Directive.

(39) Member States' competent authorities should not register or should withdraw the registration where the activities actually carried on indicate clearly that a tied agent has opted for the legal system of one Member State for the purpose of evading the stricter standards in force in another Member State within the territory of which it intends to carry on or does carry on the greater part of its activities.

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(40) For the purposes of this Directive eligible counterparties should be considered as acting as clients.

(41) For the purposes of ensuring that conduct of business rules (including rules on best execution and handling of client orders) are enforced in respect of those investors most in need of these protections, and to reflect well-established market practice throughout the Community, it is appropriate to clarify that conduct of business rules may be waived in the case of transactions entered into or brought about between eligible counterparties.

(42) In respect of transactions executed between eligible counterparties, the obligation to disclose client limit orders should only apply where the counter party is explicitly sending a limit order to an investment firm for its execution.

(43) Member States shall protect the right to privacy of natural persons with respect to the processing of personal data in accordance with Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and of the free movement of such data.[(13)]

(44) With the two-fold aim of protecting investors and ensuring the smooth operation of securities markets, it is necessary to ensure that transparency of transactions is achieved and that the rules laid down for that purpose apply to investment firms when they operate on the markets. In order to enable investors or market participants to assess at any time the terms of a transaction in shares that they are considering and to verify afterwards the conditions in which it was carried out, common rules should be established for the publication of details of completed transactions in shares and for the disclosure of details of current opportunities to trade in shares. These rules are needed to ensure the effective integration of Member State equity markets, to promote the efficiency of the overall price formation process for equity instruments, and to assist the effective operation of 'best execution' obligations. These considerations require a comprehensive transparency regime applicable to all transactions in shares irrespective of their execution by an investment firm on a bilateral basis or through regulated markets or MTFs. The obligations for investment firms under this Directive to quote a bid and offer price and to execute an order at the quoted price do not relieve investment firms of the obligation to route an order to another execution venue when such internalisation could prevent the firm from complying with 'best execution' obligations.

(45) Member States should be able to apply transaction reporting obligations of the Directive to financial instruments that are not admitted to trading on a regulated market.

(46) A Member State may decide to apply the pre- and post-trade transparency requirements laid down in this Directive to financial instruments other than shares. In that case those requirements should apply to all investment firms for which that Member State is the home Member State for their operations within the territory of that Member State and those carried out cross-border through the freedom to provide services. They should also apply to the operations carried out within the territory of that Member State by the branches established in its territory of investment firms authorised in another Member State.

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(47) Investment firms should all have the same opportunities of joining or having access to regulated markets throughout the Community. Regardless of the manner in which transactions are at present organised in the Member States, it is important to abolish the technical and legal restrictions on access to regulated markets.

(48) In order to facilitate the finalisation of cross-border transactions, it is appropriate to provide for access to clearing and settlement systems throughout the Community by investment firms, irrespective of whether transactions have been concluded through regulated markets in the Member State concerned. Investment firms which wish to participate directly in other Member States' settlement systems should comply with the relevant operational and commercial requirements for membership and the prudential measures to uphold the smooth and orderly functioning of the financial markets.

(49) The authorisation to operate a regulated market should extend to all activities which are directly related to the display, processing, execution, confirmation and reporting of orders from the point at which such orders are received by the regulated market to the point at which they are transmitted for subsequent finalisation, and to activities related to the admission of financial instruments to trading. This should also include transactions concluded through the medium of designated market makers appointed by the regulated market which are undertaken under its systems and in accordance with the rules that govern those systems. Not all transactions concluded by members or participants of the regulated market or MTF are to be considered as concluded within the systems of a regulated market or MTF. Transactions which members or participants conclude on a bilateral basis and which do not comply with all the obligations established for a regulated market or an MTF under this Directive should be considered as transactions concluded outside a regulated market or an MTF for the purposes of the definition of systematic internaliser. In such a case the obligation for investment firms to make public firm quotes should apply if the conditions established by this Directive are met.

(50) Systematic internalisers might decide to give access to their quotes only to retail clients, only to professional clients, or to both. They should not be allowed to discriminate within those categories of clients.

(51) Article 27 does not oblige systematic internalisers to publish firm quotes in relation to transactions above standard market size.

(52) Where an investment firm is a systematic internaliser both in shares and in other financial instruments, the obligation to quote should only apply in respect of shares without prejudice to Recital 46.

(53) It is not the intention of this Directive to require the application of pre-trade transparency rules to transactions carried out on an OTC basis, the characteristics of which include that they are ad-hoc and irregular and are carried out with wholesale counterparties and are part of a business relationship which is itself characterised by dealings above standard market size, and where the deals are carried out outside the systems usually used by the firm concerned for its business as a systematic internaliser.

(54) The standard market size for any class of share should not be significantly disproportionate to any share included in that class.

(55) Revision of Directive 93/6/EEC should fix the minimum capital requirements with which regulated markets should comply in order to be authorised, and in so doing should take into account the specific nature of the risks associated with such markets.

(56) Operators of a regulated market should also be able to operate an MTF in accordance with the relevant provisions of this Directive.

(57) The provisions of this Directive concerning the admission of instruments to trading under the rules enforced by the regulated market should be without prejudice to the application of Directive 2001/34/EC of the European Parliament and of the Council of 28 May 2001 on the admission of securities to official stock exchange listing and on information to be published on those securities[(14)]. A regulated market should not be prevented from applying more demanding requirements in respect of the issuers of securities or instruments which it is considering for admission to trading than are imposed pursuant to this Directive.

(58) Member States should be able to designate different competent authorities to enforce the wide-ranging obligations laid down in this Directive. Such authorities should be of a public nature guaranteeing their independence from economic actors and avoiding conflicts of interest. In accordance with national law, Member States should ensure appropriate financing of the competent authority. The designation of public authorities should not exclude delegation under the responsibility of the competent authority.

(59) Any confidential information received by the contact point of one Member State through the contact point of another Member State should not be regarded as purely domestic.

(60) It is necessary to enhance convergence of powers at the disposal of competent authorities so as to pave the way towards an equivalent intensity of enforcement across the integrated financial market. A common minimum set of powers coupled with adequate resources should guarantee supervisory effectiveness.

(61) With a view to protecting clients and without prejudice to the right of customers to bring their action before the courts, it is appropriate that Member States encourage public or private bodies established with a view to settling disputes out-of-court, to cooperate in resolving cross-border disputes, taking into account Commission Recommendation 98/257/EC of 30 March 1998 on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes[(15)]. When implementing provisions on complaints and redress procedures for out-of-court settlements, Member States should be encouraged to use existing cross-border cooperation mechanisms, notably the Financial Services Complaints Network (FIN-Net).

(62) Any exchange or transmission of information between competent authorities, other authorities, bodies or persons should be in accordance with the rules on transfer of personal data to third countries as laid down in Directive 95/46/EC.

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(63) It is necessary to reinforce provisions on exchange of information between national competent authorities and to strengthen the duties of assistance and cooperation which they owe to each other. Due to increasing cross-border activity, competent authorities should provide each other with the relevant information for the exercise of their functions, so as to ensure the effective enforcement of this Directive, including in situations where infringements or suspected infringements may be of concern to authorities in two or more Member States. In the exchange of information, strict professional secrecy is needed to ensure the smooth transmission of that information and the protection of particular rights.

(64) At its meeting on 17 July 2000, the Council set up the Committee of Wise Men on the Regulation of European Securities Markets. In its final report, the Committee of Wise Men proposed the introduction of new legislative techniques based on a four-level approach, namely framework principles, implementing measures, cooperation and enforcement. Level 1, the Directive, should confine itself to broad general 'framework' principles while Level 2 should contain technical implementing measures to be adopted by the Commission with the assistance of a committee.

(65) The Resolution adopted by the Stockholm European Council of 23 March 2001 endorsed the final report of the Committee of Wise Men and the proposed four-level approach to make the regulatory process for Community securities legislation more efficient and transparent.

(66) According to the Stockholm European Council, Level 2 implementing measures should be used more frequently, to ensure that technical provisions can be kept up to date with market and supervisory developments, and deadlines should be set for all stages of Level 2 work.

(67) The Resolution of the European Parliament of 5 February 2002 on the implementation of financial services legislation also endorsed the Committee of Wise Men's report, on the basis of the solemn declaration made before Parliament the same day by the Commission and the letter of 2 October 2001 addressed by the Internal Market Commissioner to the chairman of Parliament's Committee on Economic and Monetary Affairs with regard to the safeguards for the European Parliament's role in this process.

(68) The measures necessary for the implementation of this Directive should be adopted in accordance with Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission[(16)].

[[F1](69) The European Parliament should be given a period of three months from the first transmission of draft amendments and implementing measures to allow it to examine them and to give its opinion. However, in urgent and duly justified cases, it should be possible to shorten that period. If, within that period, a resolution is adopted by the European Parliament, the Commission should re-examine the draft amendments or measures.**]**

(70) With a view to taking into account further developments in the financial markets the Commission should submit reports to the European Parliament and the Council on the application of the provisions concerning professional indemnity insurance, the

scope of the transparency rules and the possible authorisation of specialised dealers in commodity derivatives as investment firms.

(71) The objective of creating an integrated financial market, in which investors are effectively protected and the efficiency and integrity of the overall market are safeguarded, requires the establishment of common regulatory requirements relating to investment firms wherever they are authorised in the Community and governing the functioning of regulated markets and other trading systems so as to prevent opacity or disruption on one market from undermining the efficient operation of the European financial system as a whole. Since this objective may be better achieved at Community level, the Community may adopt measures in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve this objective,

HAVE ADOPTED THIS DIRECTIVE:

Textual Amendments

F1 Substituted by Directive 2006/31/EC of the European Parliament and of the Council of 5 April 2006 amending directive 2004/39/EC on markets in financial instruments, as regards certain deadlines (Text with EEA relevance).

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(**1**) OJ C 71 E, 25.3.2003, p. 62.

(**2**) OJ C 220, 16.9.2003, p. 1.

(**3**) OJ C 144, 20.6.2003, p. 6.

(**4**) Opinion of the European Parliament of 25 September 2003 (not yet published in the Official Journal), Council Common Position of 8 December 2003 (OJ C 60 E, 9.3.2004, p. 1), Position of the European Parliament of 30 March 2004 (not yet published in the Official Journal) and Decision of the Council of 7 April 2004.

(**5**) OJ L 141, 11.6.1993, p. 27. Directive as last amended by Directive 2002/87/EC of the European Parliament and of the Council (OJ L 35, 11.2.2003, p. 1).

(**6**) OJ 56, 4.4. 1964, p. 878/64. Directive as amended by the 1972 Act of Accession.

(**7**) OJ L 228, 16.8.1973, p. 3. Directive as last amended by Directive 2002/87/EC.

(**8**) OJ L 345, 19.12.2002, p. 1.

(**9**) OJ L 126, 26.5.2000, p. 1. Directive as last amended by Directive 2002/87/EC.

(**10**) OJ L 141, 11.6.1993, p. 1. Directive as last amended by Directive 2002/87/EC.

(**11**) OJ L 9, 15.1.2003, p. 3.

(**12**) OJ L 168, 27.6.2002, p. 43.

(**13**) OJ L 281, 23.11.1995, p. 31.

(**14**) OJ L 184, 6.7.2001, p. 1. Directive as last amended by European Parliament and Council Directive 2003/71/EC (OJ L 345, 31.12.2003, p. 64.).

(**15**) OJ L 115, 17.4.1998, p. 31.

(**16**) OJ L 184, 17.7.1999, p. 23.